

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
BRIEF**

77-7037

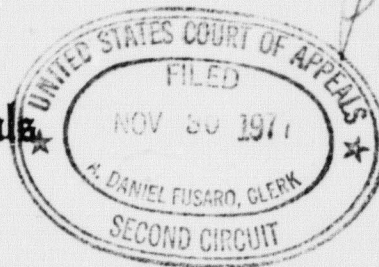
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In The
United States Court of Appeals
For The Second Circuit



NATIONAL AUTO BROKERS CORP., et al.,
Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, et al.,
Defendants-Appellees.

*On Appeal from the United States District Court for the
Southern District of New York.*

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7037

NATIONAL AUTO BROKERS CORP., FRANK MAIORANA, ANTHONY MAIORANA,
GENERAL AUTO SALES & LEASING, INC., DALE STRUMPLE; RALPH AJELLO,
AS ADMINISTRATOR OF THE ESTATE OF E. LOUIS JAMILE, DECEASED;
NABCOR OF EAST NEW YORK, INC. and ALFRED J. YOUNG, SR., SR. d/b/a
A. J. YOUNG, SR. AUTO SALES,

Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, FREDERIC G. DOWER, JAMES M. ROCHE,
BOB RAIN CHEVROLET, PAUL RAY BUICK, INC., GLEN CAMPBELL
CHEVROLET, INC., HAMISTER-GILLOUGH CHEVROLET, INC., PAVAGON
OLDSMOBILE, INC., NIAGARA FRONTIER AUTOMOBILE DEALERS ASSOCIATION,
INC. and GENERAL MOTORS ACCEPTANCE CORPORATION,

Defendants-Appellees.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

This is a reply brief by plaintiffs-appellants ("plaintiffs") to respond to the false and misleading and distorted statements and arguments made by the GM defendants-appellees on behalf of all defendants-appellees ("defendants") in the 92-page brief ("defendants' brief"). The Court should not accept any of defendants' "no evidence" or "not in dispute" claims. In most instances there is sufficient evidence and the matters are in dispute, as plaintiffs' brief and the record show. A few comments should still be made, nevertheless.

Recusal Motions

Defendants work hard at confusing this Court on the two recusal motions, made during trial. Plaintiffs and their counsel were unaware until the day before the oral recusal motion (complying with 28 U.S.C. § 455) that Messrs. Davis, Polk & Wardwell represented GI when Judge Griesa became a federal judge. Nothing that defendants can say changes that unalterable fact. The prejudice described in the oral recusal motion (backed up by the long list of prejudicial statements and actions by Judge Griesa) required that Judge Griesa remove himself, which he refused to do, with the support of defendants. The subsequent written recusal motion under 28 U.S.C. § 144, based on Judge Griesa's newly-made disclosures, during the oral recusal motion, that he personally represented a GI or GIAC top management (Salary and Bonus) committee required that the judge disqualify himself, based on the test of appearance of impropriety and/or demonstrable prejudice for extrinsic reasons. Naboor's business, and Naboor's law action before an impartial judge, should have had a substantial impact on GI's business, including its franchise system and compensation to GI's management, to the extent based on profits. Judge Griesa was aware that if Naboor obtained the requested injunctive relief, GI would have to make substantial changes in its automobile distribution system (which is the reason that GI has fought this case so long and hard, and refused to settle for a fraction of GI's cost of defense).

Defendant Rocha testified that GI's business was wholly integrated and that Nabcor's competition with the sales part, for example, could affect the other parts, such as management compensation, it can be inferred. Judge Griesa presumably had knowledge about some parts of the GI system before he became a judge, acquired in connection with his representation of GI, making it difficult for Judge Griesa to make decisions solely on the basis of the evidence brought before him and impossible for plaintiffs to combat the prejudice based on matters outside of the record, and defendants do not even show what the document is which plaintiffs never saw. What was the relevance of such document to require production in this case? And where is the proof of when the document was made available to plaintiffs and whether plaintiffs attorney ever saw the document, as defendants are strongly claiming.

Defendants' defense of allegedly belated filing of plaintiffs' affidavit of bias under 28 U.S.C. § 144 is factually incorrect. Judge Griesa only disclosed his prior representation of GI several days previously, and plaintiffs spent a reasonable amount of time to perform legal research and factual research on the matter and to prepare and execute the necessary papers, in view of the need for plaintiffs' counsel, an individual practitioner, to continue with the trial and prepare for each day of the plaintiffs' case at trial (his first trial). Also, Judge Griesa accepted the filing of the affidavit of bias without any mention of alleged belatedness under the circumstances, thereby denying plaintiffs any opportunity to establish the timeliness of the filing in light of the circumstances. Clearly, the belatedness

claim by defendants is a makeweight, diversionary argument, one that was not even raised by defendants during the trial.

This Court should determine whether or not the district court below is to adhere to the appearance of propriety standard. If any member of this Court has any doubts about the immediate reaction of members of the bar and other judges on the recusal issues herein, when proposed to them, he should make a few inquiries, which plaintiffs assure will confirm plaintiffs' argument, that Judge Griesa should have removed himself and that the bar would have expected him to do so, without the necessity of any recusal motion, but particularly after the recusal motions were made. Very few members of the bar will say that they would expect the judge to continue sitting on the case under such circumstances, particularly without bringing the matter to the attention of counsel for both sides.

Fairness to the plaintiffs, as clients of the undersigned counsel, requires that the case be remanded to a different judge for appropriate pretrial procedures (including discovery which was so frequently denied) and a new trial. This should be done irrespective of any other arguments advanced in this case, to enable plaintiffs to build a record without being affected or apparently affected by the decisions of, and restraints caused by, a judge who was, or appeared to be, prejudiced against plaintiffs.

Dealer and BADA Defendants

The dealer defendants and the BADA have said nothing other than to reply upon GM's brief, and GM's brief does not deal, or deal forthrightly, with most of the issues presented by plaintiff. Trial testimony contains many admissions by these dealers that they refused to deal with plaintiffs because GM told them not to deal (plaintiffs' blacklist argument) and because plaintiffs did not have a fleet certificate or fleet number (whitelist argument). Also, the testimony indicates which specific car sales were lost, and that plaintiffs were unable to get any cars in Buffalo until early 1968, after they had gone broke (and after which General could get the limited number of cars ordered for remaining Nabcor franchisees, plaintiff Young) under the false pretense of having a GM fleet certificate. The Buffalo evidence is overwhelming against the Buffalo dealers and the BADA and the dismissal of the action is so obviously non-defensible that the defendants do not even try seriously to argue the matter.

Unexplained Delays in Delivery

The delays were always part of plaintiffs' case against GM, even though the defendants never pursued the matter in discovery. Delays became either deliveries or cancellations, and delayed deliveries themselves were evidence of GM's involvement in interfering with Nabcor's business, causing cancellations and disruption. The dealers testified they did not cause the delays, which means that the delays had to be caused by GM. Some of the delays were caused deliberately by GM (such as with Midtown Chevrolet Division, Kline Pontiac, and the related Batt Buick forced "repurchase" of an Electra Buick by GM from Batt's showroom floor).

Availability of G1 Dealers

Naboor could always find G1 dealers willing to place Naboor's orders with G1. Dealers wanted to sell cars to Naboor and plaintiffs offer this fact as an important part of their proof. G1 dealers wanted to sell cars to Naboor and their subsequent refusals to sell (or related cancellations and delivery delays) were caused either by the wilful interference by G1 (blacklist argument) or by G1's rule that resellers of cars such as Naboor could not get fleet allotments (whitelist argument), so that G1 dealers would not get cars from G1 out of the G1 fleet allotment to fill orders for companies not on G1's approved list of customers.

Defendants do not take the next step and discuss what happens when a G1 dealer which accepts Naboor's car orders refuses to deliver 8-10 weeks later, and Naboor is forced to reorder the cars from another G1 dealer, and wait another 4-6 weeks (creating further delays, cancellations, and unsatisfied brokers and car customers). The fact that Naboor could always get new dealers to accept Naboor's orders hardly solves the problem of interference with Naboor's business of getting cars for Naboor's brokers and their customers within a reasonable period of time after the cars are first ordered.

1966-1967

Defendants emphasize the period starting after Naboor died, financially, in early 1967, and argue that Naboor's poor car-sales performance in the period after early 1967 is evidence of no injury to Naboor. The poor car-sales performance of Naboor was caused by the financial and other injuries inflicted on Naboor during the

critical start-up period of late 1966 and early 1967. Naboor should have closed its doors in early 1967, but instead chose to fight GM and try to remain in business. And Naboor only gave up the fight when Judge Griesa denied plaintiffs' preliminary injunction motion in 1973, after refusing to hear the evidence (presented in affidavit form and much of which remained unrefuted), about the numerous refusals by GM dealers to deliver cars ordered by Naboor; refusing to give any weight to the uncontested affidavits of GM dealers (former) Kemp and Kelleher relating to GM's fleet certificate program; and failing to understand that GM's fleet allotment system prevented the GM dealers from getting cars for Naboor, other than out of the dealers retail allotment, as alleged by Naboor (in absence of the blacklist activity).

The statistics compiled by defendants are disingenuous because they assume that all of Naboor's brokers are in business for the whole period covered by the statistics, when in fact the life of a Naboor broker (as to which life no statistics are mentioned) varied from an exceedingly short period (no orders submitted) to a period of several years (plaintiffs Naboor of East New York and Young, for example).

Franchisees are ordinarily dependent on their franchisor, and because of the financial difficulty of Naboor caused by the GM defendants as of early 1967, the franchisees were deprived of Naboor's contractual obligation to provide services needed by the Naboor franchisees to

survive and grow in the new industry, particularly in the marketing of their service and development of materials, systems, etc. The defendants prevented Nabcor from becoming profitable and from providing these needed services to Nabcor's franchisees, and this argument of Nabcor franchisee failure as the alleged reason for Nabcor's failure is false and misleading. Nabcor could not get the 44 Cadillacs from Colonial through the period ending in early 1967, even though Colonial wanted to obtain the cars for Nabcor, and Nabcor lost these cars sales and various brokers and was sued as a result.

A Price-Fixing Case

The evidence shows that GM's fleet allotment program and the refusals to sell to Nabcor were part of a price-fixing effort to maintain high retail prices for the benefit of GM's dealers (including GM's Midtown Chevrolet Division). GM fleet allotments were only given by GM to GM dealers for customers thereof who were not going to resell the cars within 6 months, thereby avoiding any price competition with other GM dealers. Sales by GM dealers to Nabcor, which resold the cars at substantial discounts to the retail public, created price competition which hurt GM dealers, generally. GM found it difficult to stop GM dealers from taking orders for Nabcor because Nabcor always found GM dealers who wanted to sell to Nabcor. Dealers who sold to Nabcor would make more money than dealers who did not because there were always GM dealers willing to sell to Nabcor. Only GM could stop Nabcor from getting cars (which is why

GM dealers complained to GM about Nabcor) through (i) the fleet allotment (whitelist), which was the creation of an artificial shortage of GM cars (an unreasonable restraint) to deter GM dealers from selling to Nabcor; or (ii) by telling GM dealers not to sell to Nabcor (Clements-Gillogly Chevrolet, inference in Ruckle Pontiac, "repurchase" from Batt Buick; and the import of Worack's discussion with the small Chevrolet dealer (Dengler) in Fredonia, New York.

GM-GTC Financing Refusal

Defendants say little or nothing about the GM-GTC refusal to finance Nabcor's purchase of a line of rental cars from Matt Slap Chevrolet. Matt Slap Chevrolet sought to obtain customary GTC financing for the Nabcor purchase of 25 cars, but was refused, even though the GTC-GM branch manager recommended that the financing be approved by Detroit. The reason was Nabcor's reselling of cars (not the cars to be financed).

Defendants' "Ponzi" Claim

Defendants obviously recognize the weakness of their argument when they fall back on unsupported and wholly-false charges of some kind of pyramid or ponzi scheme. Nabcor's distribution system of 150 brokers in 18 states gives the lie to such charges. Nabcor's system was changed from 1 level of franchisee to 3 levels because of GM's interference, to achieve the management objectives described in plaintiffs' brief. The "Ponzi" charge is trumped up by defendants' counsel, who probably first brought up the charge in Chicago, Illinois

when they solicited many Nabcor franchisees to bring criminal and civil suits against Nabcor and Frank Maiorana, for the apparent purpose of offering lawsuits against Nabcor as "evidence" of Nabcor's wrongdoing (see defendants' brief which makes exactly such use of various suits brought against Nabcor); one suit was filed by the nephew of Ford Motor Company's antitrust attorney in Philadelphia, who attempted to bring a class action against Nabcor (together with several other recent Nabcor franchise purchasers) in what amounted to an apparent sabotage of Nabcor by Ford Motor Company's antitrust lawyer in Philadelphia. Defendants make a big mistake in referring to litigation against Nabcor: GM's activities against Nabcor caused Nabcor's franchisees to sue, and some of the Nabcor franchisees sued as apparent shills, presumably after being solicited to sue Nabcor.

"\$3,600,000,000 in Damages" - False

Defendants start out with a deliberate, highly prejudicial misstatement when accusing plaintiffs of seeking \$3.6 billion in damages. Plaintiffs clearly indicated in their answers to interrogatories that the damages then being calculated (based on lost market share) were a small fraction of defendants' amount, which required testimony of an expert economist to describe how immediate high profits on car sales in the Nabcor system would necessarily result in a lowering of car prices through competition, and a lowering of profit margins, resulting in no more than a reasonable return on invested capital (including retained Nabcor earnings) for plaintiffs. Defendants' false representation to the Court is just another example of indefensible

misleading litigation practices designed to misdirect this Court's attention and prejudice plaintiffs' case. Similar to this is the reference to Nabcor's public offering of Nabcor debentures and stock, with the implied suggestion that Nabcor's use of bond proceeds to pursue the litigation is questionable (but GM's borrowings from banks to pay legal expenses for GM and the other defendants is not questionable). What is more offensive and clearly illegal is GM's de facto representation and coverage of substantially all of the litigation expenses for the defendants, preventing plaintiff from litigating with them. This was no more than a continuation of the conspiracy against plaintiffs and should have been stopped in the court below, but was not.

Defendants Misconceive the Arguments
Available to Them Herein

It is apparent that defendants misconceive (quite deliberately, without doubt) the nature of the legal arguments available to them on this appeal because they continue to marshal and distort the evidence as if they were trying to support a jury verdict in their favor. As they know, Judge Griesa took the case away from the jury, and defendants' argument should be that the evidence most favorable to plaintiffs is allegedly insufficient to permit reasonable men to reach a verdict in favor of plaintiffs. Defendants do not discuss the evidence favoring plaintiffs and argue as if the evidence or alleged evidence presented by them is the only evidence. Yet, the evidence most favorable to plaintiffs is substantial, as detailed in plaintiffs' brief, and defendants for obvious good reasons, choose to avoid dealing with much of this evidence, particularly

the period up to and including early 1967, when Nabcor's business was destroyed by defendants, and the Buffalo incidents in 1967-1968. They do not answer plaintiffs' analysis of Nabcor's financial statements, thereby indicating there is no answer except plaintiffs: that Nabcor had non-recurrent (franchise) profits before early 1967; that Nabcor's car sales were growing at a fast rate and Nabcor would have reached recurring profitability (on car sales) but for the 1966-1967 interferences by defendants GM, Paragon and others, which through Nabcor into turmoil and effectively eliminated Nabcor (and dependent franchisees) as of such time. If the undersigned were representing the defendants, he too would avoid answering the unanswerable.

Miscellaneous

Defendants' brief makes misstatements repeatedly, and plaintiffs will cover only a few of them. The witness who called Nabcor's franchise a rip-off had no knowledge of the franchise, and was saying that inasmuch as he (a GM dealer) knew how to obtain cars at wholesale prices, anyone who did not know how to do this was getting ripped off when they paid \$5,000 for the information and services of a purchasing organization to obtain the cars, a conclusion which probably was reached through coaching with defendants' attorneys. The alleged inexperience of Nabcor's brokers is not borne out by the record: Nabcor sought to license gas station operators and others with an automobile background in many cases: In fact, Nabcor sold a franchise to Westover Ford (a Ford dealer) in upstate New York; to a former Pontiac dealer (Schultz); a former American Motors dealer (plaintiff Strimple); a driving instructor to relate to

his school business (plaintiff Turco, Nabcor East); a former GM salesperson (Bolling, shareholder and employee of General); former manufacturer of dune buggies (ex-plaintiff Heim); used-car dealer (plaintiff Janele, deceased). Most of the persons who bought were knowledgeable, and the others also were getting a very good deal, as the complaints by GM dealers to GM show, but for GM's interferences.

The whitelist argument was contained in plaintiffs' 306-page pretrial brief

("the purpose of these practices by GM and its franchisees is to fix the retail prices of GM cars at unnaturally high levels, a conspiratorial practice known as price fixing — a per se restraint in trade, carried out through illegal, concerted refusals to deal, boycotts, blacklists, whitelists, the cutting back of retail allotments, denial or reduction of fleet allotments, territorial exclusives, customer allocations, market allocations, tying sales of warranty work and non-warranty work with the sale of the car, terminations of franchises, threats to terminate franchises, reporting of all facets of the dealer's business to GM, to name only a few of the practices." (A2122)).

Plaintiffs' complaint was highly specific about use of the fleet certificate for the allocation of cars, and denial of the fleet certificate as a means of denying cars. GM's argument that plaintiffs did not qualify for the fleet certificate is naive and misleading. Nabcor always maintained that it did not qualify for the fleet certificate, and only sought the fleet certificate to obtain the desired GM cars, which could only be obtained at low, fleet prices if the customer was approved by GM as a so-called fleet purchaser, as evidenced by (i) a listing in GM's list of approved fleet customers, (ii) the

holding of a G1 fleet certificate, or (iii) having the requisite number of cars registered in the customer's name and the customer's use of such cars in its own business.

Defendants continue to distort and deceive by saying that plaintiffs conducted 44 depositions and defendants only 19. One deposition alone by defendants (of Frank Maiorana) lasted 22 days; another (of Anthony Maiorana) lasted several days fewer; and others were also more than 1-2 days. Nor do defendants refer to the fact that many of these "44" depositions were of 10 defendants or their employees, approximately, conducted during a total of about 20 days. The misrepresentation is uncalled for.

Defendants also refer to plaintiffs' concessions that various claims of plaintiffs were not proven, without mentioning that in each case plaintiff clearly stated on the record that plaintiffs' concession in such respect was necessitated in plaintiffs' opinion by Judge Griesa's denial of discovery needed to obtain the evidence to prove such claims.

Plaintiffs' damages were reasonably calculated, comparatively small in amount, and fully believable by any reasonable persons, based on specific lost car orders, lost franchise sales (based on demonstrated sales), lost franchisees (based on a reasonable estimate of minimum sales by a broker and the value of such broker each year to Naboor), and lost car sales (based on actual sales by some brokers), among other bases.

Plaintiffs do not acknowledge that the alleged conspiracy was limited to GI and the GI dealers. Documents obtained from the New York ADA demonstrate part of the wide scope of the conspiracy, reaching into dealerships of other factories, as well as the Chrysler organization.

Judge Griesa's ruling at the evidentiary hearing on the preliminary evidentiary question did not exclude evidence at the trial on the whitelist, including fleet certificates and fleet allotments (A-2236-40). The ruling was limited to a holding that such evidence was not admissible at the hearing alone. Defendants' representation to the contrary is false and deliberate. The hearing started off with precisely such a reservation of right by plaintiffs and acceptance by Judge Griesa.

Regardless of the amount of damages to which plaintiffs are entitled, Judge Griesa also refused to grant an injunction to prohibit the GI car allotment practices, use of whitelists, fleet certificates, etc. The record is quite clear that these GI practices were responsible for many of the difficulties encountered by Nabcor in getting some of the ordered cars, or getting some of the cars delivered on time.

The availability of fleet allotments to dealers was not at all an academic issue. Fleet allotments were used by G1 to prevent its dealers from getting cars to fill Nabcor orders whether or not G1 had any shortages of cars. In other words, even if cars were plentiful, the dealers filling Nabcor orders were required to use retail orders to fill Nabcor's orders (which meant that the small Buffalo dealer with only 7-8 retail cars per month was told by G1 that it had an insufficient supply to give to Nabcor the 200 cars per year requested, irrespective of how plentiful the G1 cars were), and also some of the cars ordered by Kline Pontiac were held up by G1 because the orders were marked "fleet", even though G1 claims that cars were plentiful. G1 should have been required to explain how the shortages of fleet cars during the alleged existence of too many of retail cars is not a distribution practice designed to prevent cars from being sold to resellers such as Nabcor, for the purpose of maintaining high retail prices. The jury would have easily concluded this, if it had been given a chance.

Defendants claim that Nabcor has failed to prove that the whitelist prevented Nabcor from getting cars, but this is not so. Many of the Nabcor orders by G1 dealers were marked as "fleet" orders, requiring a fleet allotment, and this was subsequently changed by G1 to "retail", followed by terminations of dealings, delivery delays, cancellations, non-deliveries, etc. The G1 dealers wished to sell to Nabcor on a fleet (low-cost) basis out of the fleet allotment (instead of their limited retail allotment), and when G1 stopped this type of sale, the dealers stopped dealing with

Naboor stating that (i) Naboor either had to have a fleet certificate or that (ii) G1 told the dealer to stop dealing with Naboor (which latter testimony by plaintiffs was admitted solely against the dealers who made the statements, and not against G1, with the English exception).

Plaintiffs ask that the Court look carefully at plaintiffs' brief, which adequately refutes the unwarranted claims and representations made throughout defendants' 92-page brief. Every time defendants say "no evidence" they mean there is "no evidence" they are willing to disclose to the court. Such evidence is described in plaintiffs' brief. Every "it is undisputed" should be treated in similar distrustful fashion. The record clearly indicates many interferences with Naboor's system, through the blacklist and whitelist techniques, and any reasonable group of persons would be likely to conclude this, if given a chance by the trial judge. Plaintiffs deserve to have the case submitted to a jury, and Judge Griesa should have permitted this to occur, rather than permitting 7 days of argument on defendants' various motions to dismiss. The case clearly is one for a jury, if not summary judgment against defendants on the grounds of the illegal whitelist.

Naboor's case, according to Martin Kleinbard, should rise or fall on the credibility of Frank Maiorana's testimony, but the jury was not allowed to determine who was telling the truth, Frank Maiorana or G1. This was a wrongful denial of a jury trial,

for the apparent reason that defendants concluded the jury would go for plaintiffs, as they probably well would have gone.

It is respectfully urged that this Court reverse and remand for assignment of a different judge, appropriate pretrial proceedings, and a new trial.

Dated: New York, New York
November 30, 1977

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL AUTO BROKERS CORP., et al., : 77-7037
Plaintiffs-Appellants, : SDNY 70 Civ. 5421A (TPG)
-against- :
GENERAL MOTORS CORPORATION, et al. :
Defendants-Appellees. :
----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ELIZABETH C. DROSER , being duly sworn, deposes and says:

That on the 30th day of November , 1977, affiant served
a copy of the annexed and foregoing REPLY BRIEF OF PLAINTIFFS-APPELLANTS

(hereinafter, the "Document") on all Defendants' attorneys named in the list
of attorneys attached hereto, by depositing a copy of the Document in a securely-
wrapped envelope, with first-class (or priority) postage pre-paid, addressed
as set forth on said list, the last-known address of each of said attorneys,
respectively, in the United States Post Office Box maintained by the United
States Postal Service at Beekman Street and Nassau Street, in the City,
County and State of New York.

.....Elizabeth C. Droser.....
Elizabeth C. Droser

Subscribed and sworn to before me
this 30th day of November , 1977.

.....Carl E. Person.....
Notary Public

CARL E. PERSON
Notary Public, State of New York
No. 31-3063710
Qualified in New York County
Commission Expires March 30, 1978

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